

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

COLUMBIA RIVERKEEPER, ET AL.,

Plaintiffs,

v.

ANDREW WHEELER, ET AL.,¹

Defendants.

No. 2:17-cv-00289-RSM

**UNITED STATES' MOTION FOR
STAY PENDING APPEAL**

NOTE ON MOTION CALENDAR:
December 7, 2018²

Defendants Andrew R. Wheeler, Acting Administrator, and the United States Environmental Protection Agency (collectively, "EPA"), respectfully request that the Court stay its October 17, 2018 Order Re: Motions for Summary Judgment, ECF No. 39 ("Order"), pending the United States' appeal of that Order to the United States Court of Appeals for the Ninth Circuit. On November 21, 2018, the United States filed a protective notice of appeal of that Order, which denied the United States' Motion for Summary Judgment, *see* ECF No. 31, and

¹ Acting EPA Administrator Andrew R. Wheeler is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d).

² On November 20, 2018, the parties submitted a stipulated motion requesting that this Motion be noted for consideration on November 29, 2018. *See* ECF No. 45. The Court has not yet endorsed that motion.

1 granted in part Plaintiffs Columbia Riverkeeper, et al.'s Motion for Summary Judgment, *see* ECF
 2 No. 19, on the grounds that the States of Washington and Oregon "have clearly and
 3 unambiguously indicated that they will not produce a TMDL" for temperature impairments in
 4 the Columbia and Lower Snake Rivers, and that such inaction constitutes a "constructive
 5 submission" that triggers a duty for EPA to act under Section 303(d) of the Clean Water Act
 6 ("CWA"). *See* Order at 14-15; Notice of Appeal, ECF No. 46. Specifically, the Order required
 7 that EPA approve or disapprove that "constructive submission" within 30 days of the Court's
 8 Order, *id.*, that is, by November 16, 2018, and further requires that if EPA disapproves, then
 9 EPA shall issue the TMDL within 30 days after disapproval, that is, by December 17, 2018.³
 10 Order at 16; *see* 33 U.S.C. § 1313(d)(2).

11 At this time, the United States Department of Justice's Office of the Solicitor General is
 12 determining whether to pursue an appeal in this case. To maintain the *status quo ante* and
 13 prevent irreparable harm, the United States respectfully requests that the Court grant this Motion
 14 and stay its Order for the pendency of the United States' appeal.⁴

15 Counsel for Plaintiffs has informed the United States that Plaintiffs will oppose the
 16 United States' request for a stay pending appeal.

17 The grounds for this Motion are as follows:

18 1. EPA is entitled to a stay pending appeal if it establishes four factors: "that [it] is
 19 likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of
 20 preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the
 21

22 ³ The thirtieth day would be Sunday, December 16, 2018, so EPA's obligation will come due on
 23 the following Monday.

24 ⁴ In the event the United States decides against pursuing appeal, it will notify the Court and
 withdraw this Motion or seek to terminate any stay granted pursuant thereto.

1 public interest.” *See Winter v. NRDC*, 129 S. Ct. 365, 374, 376 (2008) (describing factors in the
 2 context of preliminary injunction); *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008)
 3 (describing factors in the context of stay pending appeal); *Wang v. United States*, 2010 WL
 4 55860 at *1 (W.D. Wash. Jan. 4, 2010) (“The standard for granting a stay pending appeal is
 5 effectively the same as that for issuing a preliminary injunction.” (citing *Lopez v. Heckler*, 713
 6 F.2d 1432, 1435 (9th Cir. 1983))).

7 2. These four factors weigh in favor of a stay pending appeal in this instance.

8 3. First, EPA’s appeal is likely to succeed on the merits. Numerous courts have
 9 acknowledged that the constructive submission theory “exist[s] only by judicial gloss on the
 10 CWA,” *Am. Littoral Soc’y v. EPA*, 199 F. Supp. 2d 217, 241 (D.N.J 2002), and this District
 11 Court has previously acknowledged that the constructive submission theory is not found in the
 12 text of the CWA. *Alaska Ctr. for the Env’t v. Reilly*, 762 F. Supp. 1422, 1425 (W.D. Wash. 1991)
 13 (explaining that the CWA “is silent as to the nature of EPA’s obligations if a state . . . fails to
 14 make any initial [TMDL] submission at all”). Consequently, this extra-statutory theory – which
 15 the Ninth Circuit has never expressly adopted – is an unlawful expansion of CWA Section
 16 303(d), 33 U.S.C. § 1313(d), and of the waiver of the sovereign immunity found in 33 U.S.C. §
 17 1365(a)(2), which only allows citizen suits to compel performance of a non-discretionary “act or
 18 duty under this chapter.” Even if lawful, the constructive submission theory is limited to cases of
 19 “a complete failure by a state to submit TMDLs,” *S.F. Baykeeper v. Whitman*, 297 F.3d 877,
 20 881-82 (9th Cir. 2002), as had been previously stated by the Ninth Circuit. *Alaska Ctr. for Env’t*
 21 *v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994) (explaining that allowing plaintiffs to compel
 22 issuance of individual TMDLs would be contrary to congressional directive by allowing them to
 23 “impose their own prioritization upon the EPA”); *see also Hayes v. Whitman*, 264 F.3d 1017,

1 1024 (10th Cir. 2001); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 967-968 (W.D.
 2 Wash. 1996). At a minimum, EPA's appeal raises serious questions of law in an area that is
 3 unclear. This District Court has stated that "[w]hen the request for a stay is made to
 4 a district court, common sense dictates that the moving party need not persuade the court that it
 5 is likely to be reversed on appeal. . . . Instead, the movant must only establish that the appeal
 6 raises serious and difficult questions of law in an area where the law is somewhat
 7 unclear." *Costco Wholesale Corp. v. Hoen*, 2006 WL 2645183 (W.D. Wash. Sept. 14, 2006)
 8 (quoting *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998)).
 9 Because the Court's Order applied the constructive submission theory for the first time to a
 10 single TMDL – notwithstanding the Ninth Circuit's prior discussions of the theory and
 11 notwithstanding the United States' arguments that the Ninth Circuit has not yet squarely decided
 12 the lawfulness of the constructive submission theory itself – EPA's appeal is likely to succeed on
 13 the merits or, at a minimum, presents serious and difficult questions of law in satisfaction of the
 14 first factor of the test for a stay pending appeal.

15 4. In addition, even if this Court had jurisdiction to order EPA to approve or
 16 disapprove a constructive submission of "no TMDL," EPA's appeal is likely to prevail, or at a
 17 minimum raises a serious question, regarding this Court's jurisdiction to order EPA to issue a
 18 TMDL within 30 days of any disapproval. A duty to issue a TMDL under Section 303(d)(2) is
 19 only triggered if, and when, EPA disapproves a TMDL submission. 33 U.S.C. § 1313(d)(2).
 20 Here, the intervening action – approval or disapproval of a state submission – had not yet
 21 occurred and was within the Agency's discretion (as this Court acknowledged, Order at 15). And
 22 even once a disapproval occurs, any alleged failure by EPA to timely issue a TMDL is subject to
 23 judicial enforcement only *after* a would-be plaintiff provides a 60-day notice to the Agency
 24

1 outlining the statutory violation that it believes has occurred. 33 U.S.C. § 1365(b)(2). At the time
 2 the Complaint was filed in this matter and continuing through the date of the Court's Order,
 3 Plaintiffs did not have standing to allege that EPA had failed to comply with a duty to issue a
 4 TMDL under Section 303(d), as that duty could only be triggered – and thus could only become
 5 a live case or controversy – if and when EPA actually disapproved a state submission. This
 6 Court's Order found that EPA had not yet approved or disapproved a state submission, Order at
 7 15, so EPA is likely to prevail in the Ninth Circuit on the question of the Court's jurisdiction to
 8 order performance regarding that as-yet inapplicable second duty.⁵

9 5. Second, EPA will suffer irreparable harm in the absence of the requested relief.
 10 To begin, there is a possibility that complying with the Order would moot EPA's appeal and
 11 EPA would thus lose the right to challenge the Order and its deadlines. In *NRDC v. U.S. Dep't of*
 12 *Interior*, 13 Fed. App'x 612 (9th Cir. 2001), the Ninth Circuit considered an agency appeal from
 13 a district court order that compelled the agency to designate critical habitat under the Endangered
 14 Species Act. After a district court stay request was denied, the agency complied with the order
 15 and issued the designation immediately before oral argument. The Ninth Circuit held that the
 16 case was therefore moot. *Id.* at 613. Other case law suggests that where a party *seeks* a stay in
 17 such situations, it can preserve its claims. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers*
 18 *Ass'n*, 499 U.S. 117, 128 n.3 (1991). But in light of this uncertainty, the Court should exercise
 19

20 ⁵ Since the Court's Order, and to comply with its terms (and given this Court's denial of EPA's
 21 motion to extend the date for compliance with the first deadline while it considered the necessity
 22 of appeal), EPA disapproved the "constructive submission" that was the subject of that Order on
 23 November 16, 2018. Letter to Heather Bartlett, Wash. Dept. of Ecology, & Letter to Richard
 24 Whitman, Or. Dept. of Env'tl. Quality (Nov. 16, 2018) (attached hereto as Exhibit A). But the
 fact that EPA's duty to issue a TMDL has now been triggered is irrelevant both because EPA is
 not yet in violation of that duty (and so a would-be plaintiff cannot yet provide the necessary
 notice or commence suit under 33 U.S.C. § 1365(b)(2)) and because present circumstances do
 not remedy a lack of jurisdiction at the time the Order issued.

1 “the utmost caution” to avoid a situation in which the denial of the requested relief creates a
 2 “mootness Catch-22.” *Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 837 (9th Cir.
 3 2014).

4 6. Even apart from concerns of mootness, requiring EPA to comply with the Court’s
 5 Order during the pendency of any appeal and, in particular, to complete and issue a TMDL
 6 within 60 total days from issuance of the Court’s Order will cause irreparable harm to the
 7 Agency. Compelling issuance of any TMDL within such a rapid period would impose significant
 8 hardship on EPA, as TMDL preparation routinely takes 3-5 years. *See* Declaration of Daniel D.
 9 Opalski ¶¶ 6, 12 (“Opalski Dec.”) (attached hereto as Exhibit B). But the resource burden is
 10 especially acute in the context of this technically complex, inter-state, inter-jurisdictional TMDL,
 11 which covers thousands of river miles. *See* Opalski Dec. ¶¶ 7, 9-11, 15. Given the speed and
 12 scope of the necessary work, *see* Opalski Dec. ¶¶ 8-13, preparation of the required TMDL
 13 consistent with the Court’s Order could affect EPA Region 10’s ability to comply with numerous
 14 other TMDL obligations. *See* Opalski Dec. ¶ 3. These include development of TMDLs for the
 15 Deschutes (WA) Basin and work to support the Oregon Department of Environment Quality’s
 16 development of the Klamath River Temperature TMDL and the Willamette Mercury TMDL – all
 17 of which are required by the CWA or by court orders, consent decrees, or settlement agreements
 18 and none of which EPA Region 10 has discretion to abandon or deprioritize. Opalski Dec. ¶¶ 3,
 19 4. While economic losses are not usually considered irreparable harm, these losses are not purely
 20 economic as they affect EPA’s ability to proceed with other essential, environmentally-beneficial
 21 responsibilities; in any case, these economic losses would not be recoverable in the ordinary
 22 course of litigation and so may be considered when weighing this request. *See Idaho v. Coeur*
 23 *d’Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Philip Morris USA v. Scott*, 131 S. Ct. 1, 4
 24

(2010) (“If expenditures cannot be recouped, the resulting loss may be irreparable.” (citation omitted)).

7. Short-circuiting EPA’s TMDL schedule would also irreparably harm EPA’s ability to engage in a robust TMDL process, including by limiting the time available for public notice and prior coordination with industrial dischargers; local, state, and federal agencies; and Tribal governments, Opalski Dec. ¶¶ 6, 12, 14-16; and by preventing the Agency from synchronizing and ensuring effective implementation of the TMDL by the States and others as part of the development process, Opalski Dec. ¶¶ 6, 14, 16. Public outreach during a TMDL’s development typically occurs over a period of at least one year and can provide vital input about how the TMDL will affect various constituencies. Opalski Dec. ¶¶ 6, 14, 16. Likewise, TMDLs for waters impaired by sources like dams that do not receive permit limits for temperature under the National Pollutant Discharge Elimination System present special challenges for TMDL implementation. EPA’s inability to coordinate implementation of the TMDL before issuance – including by working to address the unique challenges associated with the presence of dams – harms EPA, the TMDL process, and interested stakeholders, including Plaintiffs. Opalski Dec. ¶¶ 5, 10, 12, 14, 16. The harm of compelling issuance by December 17, 2018, weighs in favor of a stay pending appeal: EPA does not intend to stop work on the TMDL during an appeal, *see* Opalski Dec. ¶¶ 8, 13, but a stay is vital to ensure EPA is not compelled to needlessly accelerate preparation of the TMDL to comply with the Court’s deadline.

8. Third, the balance of equities favors a stay pending appeal. As noted above, Plaintiffs and other interested stakeholders would benefit from a TMDL that reflects public input prior to issuance as well as efforts to coordinate in advance those implementation mechanisms designed to accomplish the temperature goals set by the TMDL. On the other hand, an

1 accelerated schedule would not necessarily accelerate any environmental benefit that may follow
 2 from a TMDL: implementation of the TMDL at the state level (or by other federal agencies) will
 3 still be necessary before the TMDL, as with any TMDL, can result in temperature reductions in
 4 the two rivers. Opalski Dec. ¶¶ 12, 14, 16. A stay pending appeal would allow implementation
 5 planning to be synchronized and coordinated with TMDL preparation; absent a stay,
 6 implementation planning would still need to occur and may take longer, given the lack of prior
 7 coordination between the EPA TMDL and the States to develop implementation mechanisms.
 8 Opalski Dec. ¶¶ 12, 14. Because the likelihood that the Order will accelerate environmental
 9 benefit is speculative, while the risks of mootness, the burden on the Agency, and the disruption
 10 of EPA's thorough TMDL process are not, the equities favor a stay pending appeal.

11 9. Finally, a stay pending appeal is in the public interest for the reasons stated above.
 12 A stay would allow EPA to continue work on other high-priority TMDLs in the region, would
 13 ensure adequate time for prior public notice and other public engagement, would allow for
 14 coordinated TMDL development and efficient state implementation, and would not delay EPA's
 15 pre-existing schedule for TMDL completion.

16 10. Given the impending deadline in the Court's Order for issuance of a TMDL, the
 17 United States requests a decision from this Court as soon as possible, and at the latest by
 18 November 30, to allow time to seek relief from the Ninth Circuit if necessary.

19 WHEREFORE, the United States respectfully requests that the Court stay its October 17,
 20 2018 Order pending the United States' appeal of that Order to the United States Court of Appeals
 21 for the Ninth Circuit.

22 DATED: November 21, 2018

Respectfully submitted,

23 /s/ Chloe H. Kolman

24 U.S. MOTION FOR STAY
 PENDING APPEAL
 (No. 2:17-cv-00289-RSM) - 8

United States Department of Justice
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2018, I filed the foregoing United States' Motion for Stay Pending Appeal with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Chloe H. Kolman

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3123

OFFICE OF WATER AND
WATERSHEDS

NOV 16 2018

Ms. Heather Bartlett
Water Quality Program Manager
Washington Department of Ecology
P. O. Box 47600
Olympia, Washington 98504-7600

Dear Ms. Bartlett:

By this letter, the U.S. Environmental Protection Agency (EPA) is taking action to comply with the U.S. District Court for the Western District of Washington's October 17, 2018, Order regarding Motions for Summary Judgment in *Columbia Riverkeeper, et al. v. Pruitt, et al.*, No. C17-289RSM. In that order, the district court directed the EPA to approve or disapprove within 30 days a "constructive submission" of "no" total maximum daily loads (TMDLs) by the Washington Department of Ecology (Ecology) for 49 segments of the Mainstem of the Columbia River and Lower Snake River identified in the Enclosure as impaired for temperature on Washington's Clean Water Act section 303(d) List.

The EPA respectfully disagrees with and may appeal the district court's order. The EPA's position, as reflected in its briefing to date before the district court, is that there has been no constructive submission by Ecology for the temperature impairments on these listed segments. As such, EPA would not have taken this action if it had not been ordered to do so by the district court. The EPA expressly reserves the right to withdraw or revise this action in whole or in part if it obtains a judicial decision on appeal that relieves the EPA of the obligations contained in the district court's October 17, 2018, order.

As of the date of this letter, the EPA and the U.S. Department of Justice are evaluating whether to appeal the district court's order. The EPA had sought and was denied a 30-day extension to consider an appeal, notwithstanding the 60 days otherwise applicable under Rule 4(b) of the Federal Rules of Appellate Procedure for decision-making regarding appeals when a federal agency is a party. Accordingly, despite its disagreement with the court's order, the EPA is complying with that order by taking this action based on the administrative record as it existed at the time of the district court's order.

The EPA disapproves Ecology's "constructive submission" of "no" TMDL for temperature because the EPA has determined that it does not meet the statutory requirements in Clean Water Act section 303(d)(1)(C) and (d)(2), and the regulatory requirements for the EPA approval set forth in 40 C.F.R. section 130.7(c).

If you have any questions regarding this matter, please contact me at (206) 553-1855, or have your staff contact Jennifer Byrne at (503) 326-5872, or Mary Lou Soscia at (503) 326-5873.

Sincerely,

Daniel D. Opalski
Director

Enclosure

Enclosure**Washington 303(d) Temperature Impairments on the Columbia and Lower Snake Rivers**

Waterbody	Assessment unit	River mile
Columbia River	170800030900_01_02	38.6-47.5
Columbia River	170800030900_01_04	53.6 - 57.9
Columbia River	170800030900_01_05	57.9-68.1
Columbia River	170800030900_01_06	68.1 - 73.1
Columbia River	170800030900_01_07	73.1 - 76.1
Columbia River	170800030200_01_01	86.6 - 101.4
Columbia River	170800030200_01_02	101.4 - 120.5
Columbia River	170800010804_01_01	120.5 - 131.5
Columbia River	170800010802_01_01	136.8 - 142.4
Columbia River	170701051204_01_01	146.1 - 154.7
Columbia River	170701051106_01_01	154.7 - 168.9
Columbia River	170701051105_01_01	168.9 - 180.4
Columbia River	170701050406_01_01	180.4 - 191.8
Columbia River	170701050401_01_01	191.8 - 202.7
Columbia River	170701050103_01_01	202.7 215.6
Columbia River	170701011408_01_01	215.6 227.7
Columbia River	170701010601_01_01	286.5 - 292.0
Columbia River	170701010207_01_01	292.0 - 294.8
Columbia River	170701010201_01_01	305.2 - 309.3
Columbia River	170701010103_01_01	314.4 - 317.4
Columbia River	170200160604_01_01	324.5 of 338.1
Columbia River	170200160106_01_01	387.9 - 397.2
Columbia River	170200160105_01_01	397.2 - 404.4
Columbia River	170200100507_01_01	410.7 of 415.8
Columbia River	170200100506_01_01	415.8 - 421.7
Columbia River	170200100401_01_01	450.1 - 453.4

Waterbody	Assessment unit	River mile
Columbia River	170200100313_01_01	453.4 - 464.1
Columbia River	170200100308_01_01	464.1 - 468.4
Columbia River	170200100307_01_01	468.4 - 473.7
Columbia River	170200100306_01_01	473.7 - 483.7
Columbia River	170200050507_01_01	503.4 - 515.6
Columbia River	170200050505_01_01	515.6 - 523.8
Columbia River	170200050405_01_01	533.6 - 545.2
Columbia River	170200050404_01_01	545.2 - 554.8
Columbia River	170200050203_01_01	589.3 - 596.7
Columbia River (Roosevelt Lake)	48117J7B8	
Columbia River (Roosevelt Lake)	48117J7C7	
Columbia River (Roosevelt Lake)	47118J6D8	
Columbia River (Roosevelt Lake)	48118F1G1	
Columbia River (Roosevelt Lake)	48118F1J2	
Snake River	170601100404_01_01	0.3 - 9.800
Snake River	170601100403_01_01	9.8 - 21.10
Snake River	170601100106_01_01	29.8 - 41.60
Snake River	170601100103_01_01	41.6 - 51.80
Snake River	170601070807_01_01	67.4 - 70.30
Snake River	170601070804_01_01	77.9 of 91.80
Snake River	170601070802_01_01	91.8 - 107.3
Snake River	170601030307_01_01	139.3 - 150.3
Snake River	170601030303_01_01	157.6 - 168.8

Applicable State of Washington Water Quality Standards for Temperature

The stream segments listed in the table above were identified by Ecology as not attaining Washington water quality standards, set forth in Chapter 173-201A of the Washington Administrative Code, for aquatic life use categories that are described using key species (e.g., salmonid or char versus warm-water species) and life-stage conditions (e.g., spawning versus rearing) [WAC 173-201A-200 and 173-201A-602].



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3123

OFFICE OF WATER AND
WATERSHEDS

NOV 16 2018

Mr. Richard Whitman, Director
Oregon Department of Environmental Quality
700 NE Multnomah St., Suite #600
Portland, Oregon 97232

Dear Mr. Whitman:

By this letter, the U.S. Environmental Protection Agency (EPA) is taking action to comply with the U.S. District Court for the Western District of Washington's October 17, 2018, Order regarding Motions for Summary Judgment in *Columbia Riverkeeper, et al. v. Pruitt, et al.*, No. C17-289RSM. In that order, the district court directed the EPA to approve or disapprove within 30 days a "constructive submission" of "no" total maximum daily loads (TMDLs) by the Oregon Department of Environmental Quality (ODEQ) for 1 segment of the Mainstem of the Columbia River identified in the Enclosure as impaired for temperature on Oregon's Clean Water Act section 303(d) List.

The EPA respectfully disagrees with and may appeal the district court's order. The EPA's position, as reflected in its briefing to date before the district court, is that there has been no constructive submission by ODEQ for the temperature impairments on this listed segment. As such, the EPA would not have taken this action if it had not been ordered to do so by the district court. The EPA expressly reserves the right to withdraw or revise this action in whole or in part if it obtains a judicial decision on appeal that relieves the EPA of the obligations contained in the district court's October 17, 2018, order.

As of the date of this letter, EPA and the U.S. Department of Justice are evaluating whether to appeal the district court's order. The EPA had sought and was denied a 30-day extension to consider an appeal, notwithstanding the 60 days otherwise applicable under Rule 4(b) of the Federal Rules of Appellate Procedure for decision-making regarding appeals when a federal agency is a party. Accordingly, despite its disagreement with the court's order, the EPA is complying with that order by taking this action based on the administrative record as it existed at the time of the district court's order.

The EPA disapproves ODEQ's "constructive submission" of "no" TMDL for temperature because the EPA has determined that it does not meet the statutory requirements in Clean Water Act section 303(d)(1)(C) and (d)(2), and the regulatory requirements for the EPA approval set forth in 40 C.F.R. section 130.7(c).

If you have any questions regarding this matter, please contact me at (206) 553-1855, or have your staff contact Jennifer Byrne at (503) 326-5872, or Mary Lou Soscia at (503) 326-5873.

Sincerely,

A handwritten signature in cursive script, appearing to read "Daniel D. Opalski".

Daniel D. Opalski
Director

Enclosure

Enclosure***Oregon 303(d) Temperature Impairments on the Columbia River***

<i>Waterbody</i>	<i>Assessment unit</i>	<i>River mile</i>
Columbia River	1240480000000	0 – 303.9

Applicable State of Oregon Water Quality Standards for Temperature

The stream segment listed in the table above was identified by ODEQ as not attaining Oregon water quality standards, set forth in Chapter 340, Division 41 of the Oregon Administrative Rules, for aquatic life use categories that are described using key species (e.g., salmonid or char versus warm-water species) and life-stage conditions (e.g., spawning versus rearing) [OAR 340-041].

EXHIBIT B

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

COLUMBIA RIVERKEEPER, ET AL.,

Plaintiffs,

v.

ANDREW WHEELER, ET AL.,¹

Defendants.

No. 2:17-cv-00289-RSM

**DECLARATION OF
DANIEL D. OPALSKI**

I, Daniel D. Opalski, pursuant to 28 U.S.C. § 1746, declare, under penalty of perjury, that the following statements are true and correct based upon my personal knowledge, information contained in the records of the U.S. Environmental Protection Agency (“EPA” or “Agency”), and information supplied to me by current EPA employees under my supervision and employees of EPA Region 10.

1. I am the Director of the Office of Water and Watersheds for Region 10 of the EPA. I have been in this position since October 2012. I have worked at EPA for approximately

¹ Acting EPA Administrator Andrew R. Wheeler is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d).

32 years. Prior to my current position, I was Director of Region 10's Office of Environmental Cleanup for approximately 8 years, and I served as Director of Region 10's Oregon Operations Office for 5 years prior to that. In my current position, I lead an office of approximately 65 staff and managers who directly implement and/or oversee implementation by states and tribes of the majority of the federal Clean Water Act ("CWA") programs and federal Safe Drinking Water Act programs across the states of Alaska, Idaho, Oregon, and Washington.

2. I manage the matters addressed in this lawsuit through the Watershed Unit within my office. The Watershed Unit has approximately 12 full-time staff and two fellows. The Unit's responsibilities include overseeing implementation of the Total Maximum Daily Load ("TMDL") programs in the Region 10 states of Alaska, Idaho, Oregon, and Washington. The Unit's oversight involves review and approval or disapproval of TMDLs submitted by the states. Additional responsibilities of the Unit include: review and either approval or disapproval of lists of impaired waters (called 303(d) lists because of the CWA section addressing such lists) from the states; providing grant and oversight support to the Region 10 jurisdictions' nonpoint source programs that help achieve TMDL-identified pollutant reductions from nonpoint sources under CWA section 319; oversight and support for implementation of coastal nonpoint source management programs under the Coastal Zone Act Reauthorization Amendments in Oregon and Washington; and implementation of CWA section 106 state pollution control program grants and CWA section 319 nonpoint source control program grants for states and eligible tribes in the Region.

3. In addition to programmatic responsibilities arising directly from the Clean Water Act, the Watershed Unit has responsibilities arising out of litigation regarding TMDLs (and other programs) involving the Region 10 states. EPA Region 10 has state-wide TMDL obligations to

1 “backstop” the completion of a number of TMDLs pursuant to a settlement agreement in
2 Washington and pursuant to a court order in Alaska. In addition to these TMDL “backstop”
3 obligations, the Region has a number of litigation-related commitments. The Watershed Unit is
4 currently developing TMDLs to address impairments in the Deschutes Basin in Washington
5 following a disapproval of some of that state’s TMDLs. The Unit is supporting the Oregon
6 Department of Environmental Quality (ODEQ) in the development of the Klamath River
7 Temperature TMDL and the Willamette River Mercury TMDL. In addition to EPA staff efforts,
8 EPA contract support for these two TMDLs alone has required the expenditure of several
9 hundreds of thousands of dollars.

10 4. The Watershed Unit is obligated to perform all the activities described in the
11 above two paragraphs, either by the Clean Water Act or by court order, consent decree, or
12 settlement agreement to resolve previous litigation. My office has no discretion to abandon or
13 deprioritize any of these activities.

14 5. The Clean Water Act directs states to develop and establish TMDLs for each of
15 the waters that are listed by the state as not attaining water quality standards under CWA section
16 303(d). EPA reviews and then approves or disapproves submitted TMDLs. The process of
17 developing a TMDL, whether by a state or by EPA, is complex and time-consuming. First, the
18 agency developing the TMDL generally conducts and evaluates monitoring for each of the
19 pollutants addressed by the TMDL. In Oregon and Washington, modeling is used in the
20 preparation of nearly all TMDLs to assess pollutant source contributions, and to quantify the
21 potential impacts of treatment and/or restoration measures. For each TMDL, the model is
22 developed with current site-specific information and calibrated to ensure its predictive value.
23 Load allocations and wasteload allocations (supported by reasonable assurance they will be met)
24

Declaration of Daniel D. Opalski
(No. 2:17-cv-00289-RSM) - 3

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1 are then assigned to nonpoint sources and point sources, respectively. Each TMDL must provide
2 for a margin of safety to account for any lack of information. An implementation plan is not a
3 required element of a TMDL under CWA section 303(d), and EPA does not approve or
4 disapprove implementation plans that may be developed by states as part of state TMDLs.
5 Oregon and Washington do develop implementation plans for all of their TMDLs. The
6 implementation plans provide much greater specificity than the TMDL about how waste load
7 allocations and load allocations may be achieved.

8 6. In addition, the process of developing a TMDL, whether by a state or by EPA,
9 typically includes significant public involvement with permitted dischargers, engagement with
10 local, state, and federal agencies potentially affected by a TMDL, and consultation with
11 sovereign tribal governments with tribal lands and/or treaty rights that may be impacted by the
12 TMDL. When EPA establishes a TMDL after disapproval of a state's TMDL, the state would
13 already have conducted significant public engagement. Public involvement, engagement with
14 other governmental entities, and tribal consultation are important to TMDL development for
15 many reasons. The public process enables development of a TMDL crafted to consider the
16 unique situations and needs of dischargers, local governments, and upstream or downstream
17 states. Such public involvement processes typically include regular meetings with involved
18 parties over a period of at least one year. Tribal consultation processes frequently are similarly
19 involved. When EPA develops a TMDL, coordination with state water quality agencies is
20 important for confirming the proper interpretation of applicable water quality standards, sharing
21 environmental data, and coordinating TMDL assumptions with state implementation plans. From
22 the point at which monitoring and data gathering begins, it is not uncommon for the development
23 of a TMDL to take three to five years.

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Declaration of Daniel D. Opalski
(No. 2:17-cv-00289-RSM) - 4

United States Department of Justice
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1 7. In 2000, EPA Region 10 and the States of Oregon, Washington, and Idaho entered
2 into a Memorandum of Agreement (MOA) to address the TMDL development approach and to
3 identify roles for completing TMDLs for total dissolved gas and temperature for the mainstem of
4 the Columbia River from the Canadian border to its mouth and for the Snake River from the
5 Washington-Idaho border to its confluence with the Columbia River. The MOA did not assign
6 roles for tributary waters and excluded impairments other than total dissolved gas and
7 temperature. Although the MOA was signed by the States and EPA, the MOA recognized the
8 importance of participation by the Columbia Basin Tribes, the Public Utility Districts (“PUDs”)
9 with facilities on the Rivers, the managers of federal dams on the Rivers, and the Federal
10 agencies with responsibilities for protecting endangered species. The MOA specified that “a
11 critical role of EPA will be to ensure coordination of the entire TMDL development effort
12 between all involved parties,” echoing the parties’ assumption that the geographical and
13 jurisdictional scope of the TMDL called for federal entity involvement to complete it. EPA’s
14 roles under the MOA included leading the development of the temperature TMDL, providing
15 assistance on the total dissolved gas TMDLs, coordinating with all affected entities, and leading
16 the public involvement effort.

17 8. After initiating public involvement on a draft temperature TMDL in 2003, EPA
18 suspended further development for a variety of reasons. On August 10, 2017, EPA sent a letter to
19 the officials in the positions of the State signatories to the MOA, describing the several
20 significant ways in which circumstances had changed since EPA first began work on the
21 Columbia and Lower Snake Rivers temperature TMDL. Changes to applicable water quality
22 standards throughout the Columbia River Basin (as a result of litigation, adoption of tribal water
23 quality standards, and other state revisions to water quality standards), the quantification of
24

1 climate effects, and changes in the identity and contribution of point sources have necessitated
2 significant updates to virtually all of the TMDL developmental work that EPA had conducted in
3 the early 2000s. In the fall of 2017, EPA reinitiated the work to develop, update, and refine a
4 draft of the Columbia and Lower Snake Rivers temperature TMDL.

5 9. Numerous features of this TMDL distinguish it from other temperature TMDLs
6 developed in the Pacific Northwest, particularly those for smaller tributary waters. The Columbia
7 River Basin is very large (219,000 square miles in seven states in the U.S. and 39,500 square
8 miles in Canada) and includes a wide variety of geographic conditions, from rain forest to arid
9 desert. The Columbia River system has an average annual runoff of about 244 billion cubic
10 meters, second only to the Missouri-Mississippi River system in terms of runoff volumes in the
11 U.S. The tremendous quantity of water in the Columbia and Snake Rivers means that
12 temperatures in the system are quite slow to warm, but also slow to cool once warm. The Rivers
13 are notable for the presence of numerous salmon and steelhead trout. The Rivers once sustained
14 the largest salmon populations in the world. Today the populations are dramatically reduced, and
15 thirteen species or populations of salmon and steelhead in the Columbia and Snake Rivers are
16 listed as “endangered” or “threatened” under the Endangered Species Act. The presence of these
17 listed species and their sensitivity to elevated temperatures add significant challenges to
18 development of the TMDL.

19 10. In the Columbia River drainage basin TMDL study area in Washington and
20 Oregon (that is, excluding British Columbia, Idaho, Montana, Wyoming, and Nevada), there are
21 ten major federal dams and five PUD dams. The dams, which are operated for power generation,
22 flood control, and other purposes, cumulatively contribute significantly to warming in the Rivers
23 during late summer and early fall. Although the dams are a significant contributor to warming in
24

1 that season, the range of options available to reduce temperature through operational changes is
2 limited relative to the dams' overall contributions to excess heat. Because most of the water that
3 passes through the dams is not regulated for temperature under the National Pollutant Discharge
4 Eliminations System, potential temperature allocations to dams present special challenges for
5 TMDL implementation.

6 11. Another significant issue for this TMDL is climate effects contributing to
7 temperature increases in the Columbia River Basin system. Because water temperatures in the
8 Columbia River Basin are correlated to air temperatures, warmer ambient air temperatures
9 increase the overall warming of the river. Other complicating features of this TMDL include
10 warmer water from Canada as it crosses the international border, warmer water coming into the
11 study area from across interstate boundaries, and water withdrawals by the Columbia Basin
12 Project, which is the largest water delivery project in the United States, supplying water for
13 irrigation of approximately 670,000 acres.

14 12. Although every large project is unique, these types of challenges would usually be
15 addressed during TMDL development by working with the affected parties to identify their
16 interests and explore alternatives to address them. Issuing this TMDL by December 17, 2018,
17 would not provide for the usual processes and is almost certain to lead to numerous parties
18 asserting that their concerns were not adequately addressed prior to establishment of the TMDL.

19 13. EPA initiated the work necessary to develop an up-to-date version of this TMDL
20 in September 2017. Since then, EPA has completed the following work, all of which has been
21 shared with state, tribal, and federal agencies for review and comment.

- 22 • Developed a detailed memorandum on applicable state and tribal water quality
23 standards.

24 Declaration of Daniel D. Opalski
(No. 2:17-cv-00289-RSM) - 7

United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-9277

- Gathered, quality-assured, and analyzed river temperature data across the entire TMDL study area and summarized in a technical memorandum.
- Updated the RBM10 model to incorporate water quality data collected through 2016. The model update has been documented in a detailed report.
- Held numerous meetings, conference calls, and webinars with state and tribal governments and federal agencies to describe the preliminary modeling results, including temperature impacts associated with the dams and with climate change.

14. Issuing the TMDL by December 17, 2018, will constrain EPA's opportunity for public outreach, as the Agency would typically publish a draft TMDL and solicit public comment before establishing a final TMDL. EPA's regulations at 40 C.F.R. 130.7(c)(2) include a process for EPA to establish a TMDL within 30 days of a disapproval, to take public comment after establishment, and then to revise the TMDL as appropriate in response to comments received. Such a process retains the ability of affected constituencies to be heard. It is not, however, the usual TMDL process described in Paragraph 6, above, and EPA's use of an alternate process risks causing confusion among the public. It also results in inefficiencies that could be avoided by involving parties during key stages of the development of the TMDL. Further, as described above, TMDLs issued by Washington and Oregon are accompanied by implementation plans or strategies describing how each State will ensure that the allocations provided in the TMDL will be achieved. The implementation plans detail how state laws, regulations, programs, agencies, and other state mechanisms will be used to achieve the outcomes described in the TMDL. An implementation plan is not a required element of TMDL and EPA would not be developing an implementation plan as part of this TMDL. The CWA limits the implementation mechanisms EPA is authorized to employ. That is why coordination

1 with the States in their development of implementation plans simultaneous with EPA's
2 development of the TMDL is so important and reduces the chance of problems when
3 implementation plans are developed after the fact.

4 15. Completing the temperature TMDL for the mainstem Columbia and Lower Snake
5 Rivers by December 17, 2018, also means that EPA will not be able to complete its current effort
6 to determine whether the current cold water refugia (pockets and pathways of cold water used by
7 fish during periods of high water temperature) are sufficient to protect fish migrating through the
8 lower Columbia River before the TMDL is established. Further, all of EPA's technical work will
9 lack the full extent of internal and external review typical for a project of this scope. Some
10 information inventories, such as point source discharger listings, may be incomplete due limited
11 time for information gathering. At this point, not knowing the extent of any of these potential
12 deficiencies, EPA cannot predict whether they will require a subsequent revision to the TMDL.

13 16. The compressed time frame to complete the TMDL by December 17, 2018,
14 requires EPA to delay engaging with the many important entities with interests in this TMDL.
15 Should some, or all, of the fourteen Columbia River Basin tribal governments request formal
16 tribal consultation, that consultation cannot occur until after the establishment of the TMDL.
17 Additionally, since the fall of 2017, EPA has been engaging with the agencies that manage the
18 Federal Columbia River Power System; the deadline to issue the TMDL by December 17 has
19 already caused, and will continue to cause, EPA to greatly compress and reduce our ongoing
20 engagement, with the likely result that EPA will not have the benefit of the full assistance of the
21 operators of the federal hydroelectric projects prior to establishment of the TMDL. EPA's
22 partnership and coordination with the Washington Department of Ecology and Oregon
23 Department of Environmental Quality on consequential policy choices, including those that will
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1 affect implementation, will be severely limited until after the TMDL is established. And
2 similarly, full involvement of the three PUDS (Grant County PUD, Chelan County PUD, and
3 Douglas County PUD) that operate the five PUD dams, the many point source dischargers, and
4 the general public will have to wait until after EPA has established the TMDL. In each one of
5 these cases, affected entities will be heard, but the TMDL will be established *before* EPA has the
6 benefit of their engagement.

7 21 November 2018
8 Date


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DANIEL D. OPALSKI

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

)	
COLUMBIA RIVERKEEPER, ET AL.,)	No. 2:17-cv-00289-RSM
)	
Plaintiffs,)	[PROPOSED] ORDER GRANTING
)	UNITED STATES' MOTION FOR
v.)	STAY PENDING APPEAL
)	
ANDREW WHEELER, ET AL., ¹)	NOTE ON MOTION CALENDAR:
)	December 7, 2018 ²
Defendants.)	
)	

THIS MATTER having come before the Court upon the United States' Motion for Stay Pending Appeal, it is hereby ORDERED that the Motion is GRANTED. Accordingly, it is hereby ORDERED that the Court's October 17, 2018 Order re: Motions for Summary Judgment (ECF No. 39) is STAYED for the duration of the United States' appeal of that Order to the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

¹ Acting EPA Administrator Andrew R. Wheeler is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d).

² On November 20, 2018, the parties submitted a stipulated motion requesting that this Motion be noted for consideration on November 29, 2018. *See* ECF No. 45. The Court has not yet endorsed that motion.

1 DATED this ____ day of December, 2018.

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3 RICARDO S. MARTINEZ
United States District Judge

4 Presented by:

5 /s/ Chloe H. Kolman
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